

Licensees never stated that Mr. Rice was to be completely excluded from all station activities, they should not and cannot be faulted for not reporting Mr. Rice's non-managerial, policy, or decision-making station activities.

38. In short, there is no record evidence, or reasonable inference, of any deliberate intent by the Licensees to mislead or deceive the Commission as to Mr. Rice. Rather, the record shows that Mrs. Cox was concerned that the content of the Licensees' initial June 1991 §1.65 report was no longer accurate after Mr. Rice began to undertake certain limited consultative tasks, and she undertook to modify the reports accordingly. Each §1.65 report was formulated based on her firsthand knowledge of station operations and the input she received from her General Managers. This is the standard manner in which Licensees gather information to supply to the Commission, and Mrs. Cox had no reason to make any extraordinary inquiries. Nor can the Licensees be faulted for not allowing Mr. Rice to review and approve their §1.65 reports when they intentionally, and properly, excluded him from such management-level activities.

39. Consequently, if the Commission concludes, upon reconsideration, that the Licensees committed any reporting inaccuracies, it should also conclude that they were "blunders totally devoid of the requisites of deliberate misrepresentations" or lack of candor. See Reding Broadcasting, Inc., 69 FCC 2d 2201, 2207 (Rev. Bd. 1978). In other words, where, as here, a finding of misrepresentation or lack of candor hinges, in part, upon knowledge of Mr. Rice's alleged "directives" to Mr. Hanks or Mr. Rhea and upon whether such conversations constituted managerial or policy decision-making, the failure to report such alleged "involvement" falls far short of demonstrating an intent to deceive. Clearly, the Licensees attempted, in good faith, to comply with §1.65 of the Rules. If somehow they fell short by not providing as much detail as the Commission now would have liked, this shortcoming was unintentional and not disqualifying.

40. Finally, the Decision engages in pure speculation in concluding that the Licensees had a motive to mislead or deceive the Commission in their reports to try to forestall a Commission investigation into the criminal allegations pending against Mr. Rice. There is no evidence that the Licensees believed that the specific language used in their §1.65 reports would forestall the initiation of any Commission inquiry. In fact, the Licensees fully expected the Commission to launch an investigation after Mr. Rice was convicted, and, therefore, they filed a "Brief in Opposition to Commencement of Revocation or Evidentiary Hearing" in December 1994. The Licensees were merely trying to comply with unwritten Commission reporting standards for pending criminal proceedings. The Decision errs in finding any motive to mislead or deceive in the contents of the Licensees' §1.65 reports, and Issue 2 should be resolved in the Licensees' favor.

**D. Revocation Of The Licensees' Authorizations  
Violates The Eighth Amendment**

41. The Licensees submit that, while the courts have given the Commission latitude in selecting sanctions for wrongdoing, revoking all of the Licensees' licenses and construction permits in this proceeding would violate the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. The penalty of license revocation because of Mr. Rice's felony convictions is excessive and unconstitutional under established Supreme Court case law.

42. Specifically, the Licensees previously cited Austin v. United States, 509 U.S. 602 (1993), in which the Supreme Court held that the Excessive Fines Clause applies to the civil forfeiture of property used to facilitate the commission of a Federal drug offense. There, the Court ruled that a civil forfeiture constituting payment to the government is a punishment because it does not serve a solely remedial purpose within the meaning of the Eighth Amendment. Less than a month ago, however, the Court held in U.S. v. Bajakajian, 66

U.S.L.W.4514, 4518-19 (U.S. June 22, 1998), that a civil forfeiture of \$357,144 for a currency reporting offense was unconstitutional under the Excessive Fines Clause because it is "grossly disproportional to the gravity of the defendant's offense". The Licensees submit that the revocations here easily satisfy the "grossly disproportional" test and are therefore unconstitutional.

43. The Decision (¶42) attempts to distinguish Austin on the grounds that the purpose of revocation "is not to impose punishment," but, rather, the Commission may revoke an authorization "where, as here, it finds that the licensee or permittee has not met its statutory obligation to operate its facility in the public interest" (emphasis added). However, the Decision nowhere demonstrates, and there is no record support for the proposition, that the Licensees have failed to "operate" their facilities in the public interest. To the contrary, the Decision (¶15) concludes that "the Licensees have had a good overall record of FCC rule compliance".

44. While one may surmise that the Decision is actually equating the Licensees' supposed §1.65 reporting violations with failing to "operate" their stations properly, Footnote 8 of the Decision suggests that the "failure" for which the Licensees are being penalized is really "the Licensees' failure to undertake adequate remedial steps," i.e., their failure to "fire" Mr. Rice as sole owner, President, and occasional consultant of the Licensees and their stations. Indeed, it is clear that the Commission would prefer that such a "firing" occur. See Faulkner Radio, Inc., 88 FCC 2d 612, 618 (1981) (license renewals conditioned on "total exclusion" of former Vice President, director, 15.75% shareholder, and general manager who had committed serious broadcast-related misconduct from the operation of the licensee or any of its stations). However, the Licensees submit that, under the facts herein, there is no Constitutional or other lawful basis for the Commission to demand such a "firing" as the price that the Licensees must pay to prevent revocation of their authorizations as a penalty for Mr. Rice's misconduct and for the Licensees' supposed §1.65 reporting violations. See Bajakajian, 66 U.S.L.W. at 4518-19.

45. Despite the Commission's protestations to the contrary in the Decision, its revocation authority has consistently been held by the Commission and the courts as an appropriate civil "penalty," punishing various misconduct. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 378 (1981) (license revocation is "penalty" under §312(a)(7) of the Act); Renewal/ Revocation Approach, 93 FCC 2d 423, 432 (1983) (same); Broadcast Hoaxes, 7 FCC Rcd 4106, 4107 (1992) (admonition and license revocation or non-renewal are "penalties" for perpetration of broadcast hoaxes); Theodore E. Sousa, 92 FCC 2d 173, 179 (1982) (revocation is appropriate "penalty" under §312(a)(2) of the Act). Thus, given the punitive nature of revocation, the Commission's actions herein clearly must be scrutinized under the Excessive Fines Clause, and the Commission must apply the Austin and Bajakajian cases to determine the constitutional propriety of license revocation. Cf. United States v. Reveille, 21 F.3d 1118, 1994 WL 118068 (9th Cir. 1994) (unpublished opinion) (forfeiture of radio broadcast equipment may be "punishment" subject to scrutiny under Excessive Fines Clause).

46. Revocation of any of the Licensees' licenses or permits under Issue 1 plainly would be wholly punitive, given the Licensees' record of exemplary Commission compliance. And, considering that a Missouri court already has punished Mr. Rice by imposing on him a prison term of eight years, revocation of the Licensees' authorizations would be clearly excessive under the Eighth Amendment and, thus, unconstitutional. Likewise, under Issue 2, where the evidence does not support a conclusion that the Licensees misrepresented facts, lacked candor, or acted with an intention to deceive the Commission in this §1.65 reports, revocation of the Licensees' authorizations is unduly punitive and represents an improper and excessive exercise of the Commission's discretion, contrary to the public interest

### III. CONCLUSION

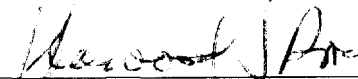
47. The ultimate question herein is whether the evidentiary record considered as a whole, when weighed against Commission policy, case precedent, constitutional law principles, and the paramount public interest, requires the revocation of the Licensees' five licenses and two construction permits. Neither the record evidence nor the law supports an adverse conclusion under Issue 1 or Issue 2. Consequently, revocation of any of the Licensees' licenses or permits is unwarranted and, at most, a monetary forfeiture may be levied under Issue 2.

WHEREFORE, in light of the foregoing, the Licensees respectfully urge that reconsideration should be granted, and this proceeding should be terminated without the revocation of any licenses or construction permits.

Respectfully submitted,

**CONTEMPORARY MEDIA, INC.  
CONTEMPORARY BROADCASTING, INC.  
LAKE BROADCASTING, INC.**

By: \_\_\_\_\_



Howard J. Braun  
Jerold L. Jacobs  
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Michael D. Gaffney

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(202) 463-4640

Their Attorneys

Dated: July 27, 1998

Law offices of

**Donald L. Wolff &  
Paul J. D'Agrosa**

8019 Forsyth  
St. Louis (Clayton) Missouri 63105  
(314) 725-8019  
Facsimile (314) 725-8443

William C. Ekst

July 23, 1998

Federal Communications Commission  
1919 M. Street NW  
Washington, D.C. 20554

Re: MM Docket No. 95-154  
Contemporary Media, Inc., et al

Dear Sir or Madam:

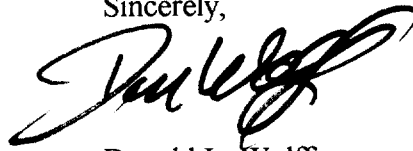
This letter is submitted to you in connection with a Petition for Reconsideration filed in the above-referenced proceeding by Contemporary Media, Inc., Contemporary Broadcasting Inc. and Lake Broadcasting Inc. (together, the "Licensees"). I have been a member of the Bar of the State of Missouri since 1962 and have specialized in criminal law for more than thirty-five years. I currently serve as counsel for Michael S. Rice, a principal of the Licensees, in connection with his anticipated parole.

The following information concerning Mr. Rice's status is tendered for your consideration.

On April 20, 1998, Michael Rice began a 12-month Missouri Sexual Offender Program (MOSOP). (See copy of MOSOP notification to Mr. Rice attached hereto.) Completion of the program is a prerequisite to Mr. Rice's release from confinement. On March 27, 1998, prior to commencing his participation in MOSOP, Mr. Rice received notice from the Missouri Department of Corrections and Human Resources Board of Probation and Parole that his conditional release date is December 29, 1999. Upon Mr. Rice's completion of MOSOP in April 1999, however he will be entitled to "credit time", i.e., an earlier release based on good behavior. Accordingly, Mr. Rice may be released from confinement as early as April 30, 1999 but I expect not later than December 29, 1999.

Should any additional information concerning this matter be desired, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Donald L. Wolff', with a large, stylized flourish at the end.

Donald L. Wolff

DLW/tes  
enclosure



STATE OF MISSOURI  
DEPARTMENT OF CORRECTIONS  
**MOSOP NOTIFICATION**

NAME OF INSTITUTION

FCC

INMATE NAME

RICE, MICHAEL

REGISTER NUMBER

510054

YOU HAVE BEEN SCHEDULED TO BEGIN THE FOLLOWING REQUIRED PART(S) OF THE MISSOURI SEXUAL OFFENDER PROGRAM ON:

DAY	DATE	TIME	THIS WILL LAST FOR	NUMBER HOURS	TIMES/WEEK	NUMBER OF WEEKS
MON	4-20-98	1:15				

CLASS LOCATION

Bldg 29 Rm 212

- ☐ Phase I, Part 1: Initial/Clinical Information Interview
- ☐ Phase I, Part 2: Orientation Sessions
- ☐ Phase II, Part 1: Responsibility Therapy and Skills Treatment Planning Interview
- ☒ Phase II, Parts 2-5: Responsibility Therapy and Skills Treatment
- ☐ Other: \_\_\_\_\_

**FAILURE TO APPEAR MAY RESULT IN A CONDUCT VIOLATION AND/OR AN INCOMPLETE FOR THAT COMPONENT**

MOSOP STAFF MEMBER

CBishop CW

DATE

4-15-98

MO 931-1138 (2-91)

DISTRIBUTION: WHITE - INMATE, CANARY - MOSOP FILE



CERTIFICATE OF SERVICE

I, Dolly M. LaFuenta, a secretary in the law offices of Rosenman & Colin LLP, do hereby certify that on this 27th day of July, 1998, I have caused to be hand-delivered or sent by U.S. mail, postage prepaid, a copy of the foregoing "Licensees' Petition for Reconsideration" to:

The Honorable William E. Kennard, Chairman\*  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, DC 20554

The Honorable Susan Ness, Commissioner\*  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, DC 20554

The Honorable Harold Furchgott-Roth, Commissioner\*  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, DC 20554

The Honorable Michael K. Powell, Commissioner\*  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, DC 20554

The Honorable Gloria Tristani, Commissioner\*  
Federal Communications Commission  
1919 M Street, N.W., Room 826  
Washington, DC 20554

John I. Riffer, Esq.\*  
Assistant General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Room 610  
Washington, DC 20554

James W. Shook, Esq.  
Jamila Bess Johnson, Esq.  
Roy W. Boyce, Esq.  
Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 8202  
Washington, D.C. 20554

  
Dolly M. LaFuenta

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\*By Hand